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No. 93-1776

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

GORDON L. HALL, et al.,
Petitioners,

v.

VAL JOHN GREEN,
Respondent.

and

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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August 29, 1994

5 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY 1

CONCLUSION 2

TABLE OF AUTHORITIES

PAGE

Cases

Feres v. United States,
340 U.S. 135 (1950) 1, 2

Hale v. United States,
416 F.2d 355 (6th Cir. 1969) 1

Lauer v. United States,
968 F.2d 1428 (1st Cir. 1992) 1

Parker v. United States,
611 F.2d 1007 (5th Cir. 1980) 1

United States v. Johnson,
481 U.S. 681 (1987) 1

United States v. Carroll,
369 F.2d 618 (8th Cir. 1966) 1

Statutes

42 U.S.C. §§ 2651-2653 . . . . . 1, 2

PETITIONERS' REPLY

The government in its brief argues that the "incident to service" test under *Feres v. United States*, 340 U.S. 135 (1950), is different than the "line of duty" determination under military regulations. However, the government has failed to point out that when it is *defending* actions for military-related injuries, it consistently takes the position that the "incident to service" test is broader than the "line of duty" determination. That was the government's position in *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980), which the government relies upon in its opposition to the certiorari petition, and that has been its position in many other cases. *See Lauer v. United States*, 968 F.2d 1428 (1st Cir. 1992); *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969); *United States v. Carroll*, 369 F.2d 618, 622 (8th Cir. 1966).

That position is both logical and correct because anyone who is injured in the "line of duty" must, by definition, have been in a status, at the time of the injury, that was "incident to service." Thus, if a soldier is injured in the "line of duty," the factors that are the basis for the *Feres* doctrine are necessarily present: receipt of compensation benefits, military status at the time of injury, and the distinctive federal character of the military relationship. *United States v. Johnson*, 481 U.S. 681 (1987).

In this case, however, the government has abandoned that position. It is now asserting claims as a plaintiff, seeking to recover under the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653, for hospital expenses paid on behalf of a soldier as the result of the alleged negligence of another soldier. In its present posture as plaintiff, the government takes the position that even though a solider was injured in the "line of duty," his status at the time was not "incident to service."

The government should not be allowed to have it both ways. The same rule should apply to the government whether it is the defendant or the plaintiff in an action. Because there is no

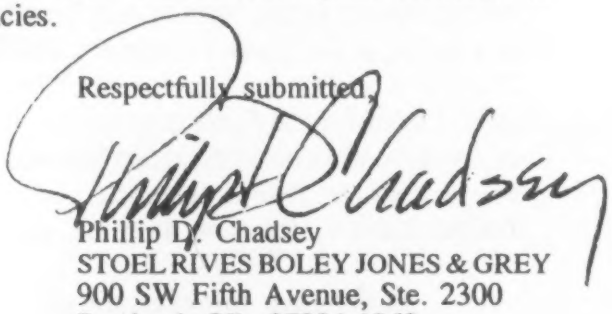
dispute that plaintiff Green was injured while in the "line of duty," the government's claim should be barred by the *Feres* doctrine.

If the government now wants to limit the scope of the *Feres* doctrine by eliminating it as a defense to a claim by the government under the Federal Medical Care Recovery Act, then this Court should grant certiorari. Plaintiff has suggested that the doctrine be abandoned entirely. That would certainly be a better policy than permitting it to be invoked as a defense *by* the government but not as a defense *against* the government.

CONCLUSION

Both the government and the various circuits have taken inconsistent positions on the application of the *Feres* doctrine and on the relationship between the "line of duty" and "incident to service" determinations. This Court should grant certiorari to resolve the inconsistencies.

Respectfully submitted,



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